No. 06-593

In The

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.
and
MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF LAW PROFESSORS AND HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

JAMES REIF
GLADSTEIN, REIF & MEGINNISS, LLP
817 Broadway, Floor 6
New York, New York 10003-4709
(212) 228-7727

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. DOL'S THIRD-PARTY REGULATION IS INCONSISTENT WITH CONGRESSIONAL INTENT	4
A. CONGRESS DID NOT INTEND THE PHRASE "DOMESTIC SERVICE EMPLOYMENT" TO INCLUDE THIRD-PARTY DOMESTIC SERVICE EMPLOYMENT	4
B. CONGRESS INTENDED TO EXCLUDE ONLY NON-"BREAD-WINNERS" WHO WORK AS DOMESTIC SERVICE COMPANIONS	12
II. OTHER FEDERAL EMPLOYMENT STATUTES SUPPORT THE EXCLUSION OF DOMESTIC SERVICE COMPANIONS EMPLOYED BY THIRD PARTIES	13
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES:

30 Sutton Place Corp. & Local 32B-32J, Service Employees Int'l Union, 240 NLRB 752 (1979) 14

Ankh Serv., Inc., 243 NLRB 478 (1979) 14

Personal Touch Home Care, Inc., Case No. 29-RC-9697 (2001), http://www.nlrb.gov/nlrb/shared_files/decisions/dde/2001/2-RC-22447.pdf 14

Success Village Apartments, Inc. v. Local 376, UAW, 397 A.2d 85 (Conn. 1978) 14

STATUTES AND REGULATIONS:

29 U.S.C. § 152(3) 14

29 U.S.C. § 206(f) 2

29 U.S.C. § 207(l) 2

29 U.S.C. § 213(a)(15) 2, 10, 11

42 U.S.C. § 409(a)(6)(B) (2000) 14

39 Fed. Reg. 35385 (1974) 4, 5

20 C.F.R. § 403.809 (1949) 14

29 C.F.R. § 552.109(a) 3

29 C.F.R. § 1975.6 ..... 14, 15

119 Cong. Rec. 24,796 (1973) 4

119 Cong. Rec. 24,797 (1973) 9, 10

119 Cong. Rec. 24,798 (1973) 10

119 Cong. Rec. 24,799 (1973) 10

Social Security Act of 1935 § 210(b)(2), 49 Stat. 625 13

TABLE OF AUTHORITIES

Page

BOOKS, ARTICLES, AND REPORTS:

H.R. Conf. Rep. No. 93-413, 93rd Cong., 1st Sess. (1973) 12

H.R. Rep. No. 93-232, 93rd Cong., 1st Sess. (1973) 9

H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. (1974) ...5, 9, 12

S. Rep. No. 93-300, 93rd Cong., 1st Sess. (1973).....4, 5, 10

S. Rep. No. 93-690, 93rd Cong., 2d Sess. (1974).....*passim*

Department of Labor, Report to Congress on Minimum Wage and Maximum Hours (1973)..... 5, 6

Department of Labor, Private Household Workers (1974)..... 4

Department of Labor, Report to Congress on Minimum Wage and Maximum Hours (1974)..... 4, 6

BENJAMIN ANDREWS, ECONOMICS OF THE HOUSEHOLD (1935) 6, 7

Jean Collier Brown, *Reading List of References on Household Employment,* BULLETIN OF THE WOMEN'S BUREAU, No. 154 (1937)..... 8

ELIZABETH CLARK-LEWIS, LIVING IN, LIVING OUT (1994)..... 8

BRENDA CLEGG GRAY, BLACK FEMALE DOMESTICS DURING THE DEPRESSION IN NEW YORK CITY, 1930-40 (1993)..... 7

Clara Cook, *Help Wanted!* (Women's Trade Union League, 1939)..... 7

Marie Correll, *Standards of Placement Agencies for Household Employees,* BULLETIN OF THE WOMEN'S BUREAU, No. 112 (1934)..... 7, 8

TABLE OF AUTHORITIES

Page

STEVE DAWSON & RICK SURPIN, DIRECT CARE HEALTH WORKERS: THE UNNECESSARY CRISIS (2001), http://www.directcareclearinghouse.org/download/Aspen.pdf 12

Benson Ellis, *Unemployment Insurance for the Household Worker*, 34 J. OF HOME ECON. 161 (1942) 7

Mary Everett, *Can Domestic Service Be Standardized? Industrial Regulation Versus Human Values in Household Employment*, 30 J. AM. ASS'N U. WOMEN 90 (1937) 7

EVELYN NAKANO GLENN, ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE (1986) 8

Household Employment and the Business Basis, 2 BULL. INTER-MUNICIPAL COMM. ON HOUSEHOLD RES. 8 (Nov. 1905) 6

Eleanor B. Johnson, *Household Employment in Chicago*, BULLETIN OF THE WOMEN'S BUREAU, No. 106 (1933) 8

DAVID M. KATZMAN, SEVEN DAYS A WEEK: WOMEN AND DOMESTIC SERVICE IN INDUSTRIALIZING AMERICA (1978) 8

Nursing Workforce Recruitment and Retention of Nurses and Nurse Aides Is a Growing Concern: Hearing Before the S. Comm. on Health, Education, Labor & Pensions 107th Cong. 22 (2001), http://www.gao.gov/new.items/d01750t.pdf 12

PHYLLIS M. PALMER, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945 (1989) 8

TABLE OF AUTHORITIES

Page

JUDITH ROLLINS, BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS (1985) 9

Peggie Smith, *Regulating Paid Household Work: Class, Gender, Race and Agendas of Reform,* 48 AMERICAN UNIV. L. REV. 851 (1999) 6

Peggie Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the 21st Century,* 92 IOWA L. REV. – (forthcoming 2007) 15

ROBYN STONE, LONG-TERM CARE WORKFORCE SHORTAGES: IMPACT ON FAMILIES (2001), *available at* http://www.bjbc.org/content/docs/LTC_Workforce_Shortages.pdf 12

BONNIE THORNTON-DILL, ACROSS THE BOUNDARIES OF RACE AND CLASS: AN EXPLORATION OF WORK AND FAMILY AMONG BLACK FEMALE DOMESTIC SERVANTS (1994) 9

Amey Watson, *Household Employment in Philadelphia,* BULLETIN OF THE WOMEN'S BUREAU, No. 93 (1932) 8

BERNADETTE WRIGHT, DIRECT CARE WORKERS IN LONG-TERM CARE (2005), http://www.hcbs.org/files/75/3748/directcare.pdf 13

INTEREST OF THE *AMICI CURIAE*[1]

The individual *amici* are law professors and historians who teach, write about, or study the history of the Fair Labor Standards Act or the history of domestic service in the United States. *Amici* respectfully file this brief in support of the Respondent's challenge to the Department of Labor's regulation extending the Fair Labor Standards Act's "companionship exemption" to third-party employers. Based on our study as historians and law scholars, we believe that the historical record demonstrates that Congress did not intend the exemption to apply to third-party employers of companions.

Amici include Mark Barenberg, Professor of Law, Columbia University; Eileen Boris, Hull Professor of Women's Studies, University of California, Santa Barbara; Nancy Dowd, Chesterfield Smith Professor of Law, Levin College of Law, University of Florida; Cynthia Estlund, Catherine A. Rein Professor of Law, New York University School of Law; Evelyn Nakano Glenn, Professor, Asian American Studies, University of California, Berkeley; Jennifer Gordon, Associate Professor of Law, Fordham Law School; David Katzman, Professor of American Studies & History, University of Kansas; Laura Kessler, Associate Professor of Law, University of Utah, S. J. Quinney College of Law; Jennifer Klein, Assistant Professor of History, Yale University; Phyllis Palmer, Professor of American Studies & Women's Studies, George Washington University; Judith Rollins, Professor of Africana Studies &

---

[1] All parties have consented to the filing of this brief. Copies of their written consents have been filed with the Clerk of the Court. *Amici curiae* certify that no counsel for a party has authored any part of this brief.

Sociology, Wellesley College; Katharine Silbaugh, Professor of Law, Boston University School of Law; Peggie Smith, Professor of Law, University of Iowa College of Law; Michael Wishnie, Clinical Professor of Law, Yale University; and Noah Zatz, Acting Professor of Law, University of California, Los Angeles, School of Law.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Prior to 1974, the Fair Labor Standards Act (FLSA) did not reach workers in domestic service employment – those employed by private households – because of doubt about whether they were engaged in interstate commerce. Congress specifically extended coverage to these workers in 1974, when it amended the FLSA to apply to employees "employed in domestic service in a household." 29 U.S.C. § 206(f) (including domestic service workers in the minimum-wage provisions); 29 U.S.C. § 207(l) (including domestic service workers in the overtime provisions).

In passing the domestic service amendment, Congress simultaneously limited its reach by crafting an exemption from the FLSA's minimum-wage and overtime provisions for persons "employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves. . . ." 29 U.S.C. § 213(a)(15). As a result of the exemption, the FLSA does not apply to employees in domestic service employment who provide companionship

[2] Institutional affiliations are provided for purposes of identification only.

services. The Department of Labor (DOL) has interpreted the companionship services exemption to apply to third-party employers such that domestic service employees "who are engaged in providing companionship services . . . and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements. . . ." 29 C.F.R. § 552.109(a). The regulation allows third-party employers, including home care agencies that place domestic service employees in individual private homes, to avoid paying the workers minimum wages and overtime under the FLSA. The United States Court of Appeals for the Second Circuit held that 29 C.F.R. § 552.109(a) was inconsistent with congressional intent in amending the FLSA in 1974 to extend the coverage to domestic service employees.

Both the legislative history of the companionship services exemption and the general history of domestic service support the Second Circuit's determination that extending the "companionship exemption" to third-party employers is inconsistent with Congressional intent in amending the FLSA to cover domestic service employees. History reveals that Congress understood "domestic service employment," as that phrase is used in the companionship exemption, to refer to an individual and personal employment relationship, not a third-party relationship that involves an agency.

ARGUMENT

I. DOL'S THIRD-PARTY REGULATION IS INCONSISTENT WITH CONGRESSIONAL INTENT

A. Congress Did Not Intend the Phrase "Domestic Service Employment" to Include Third-Party Domestic Service Employment

The legislative history of the 1974 Amendments supports the conclusion that "domestic service employment" was not intended to apply to third-party employers of the type at issue in the case before the Court. First, at the time of the 1974 Amendments, the FLSA already protected domestic service employees employed by third-party employers where the third party was an entity that qualified as part of an enterprise. *See* 39 Fed. Reg. 35385 (1974) (DOL finding that "[e]mployees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services . . . [were] subject to the [FLSA] prior to the 1974 Amendments"); Department of Labor, Private Household Workers (1974), at 7, n.1 ("Employees of a household service business are *presently* covered by the FLSA if the business is a part of an enterprise under section 3(s) of the Act.") (emphasis added).[3] Consequently, Petitioners' argument that "domestic service employment" includes third-party employers would mean that

[3] Members of Congress were fully aware of this preexisting coverage because the DOL reported it to them in reports that were cited in the Committee Reports and on the floor. *See* S. Rep. No. 93-300, at 21 (referencing the 1973 DOL Report, Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act); S. Rep. No. 93-690, at 19 (referencing the 1974 DOL Report, Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act); 119 Cong. Rec. 24,796 (1973) (statement of Sen. Dominick) (same).

previously covered domestic service employees performing companionship services would be excluded in the aftermath of the 1974 Amendments. Such a result runs completely counter to Congress' purpose in amending the FLSA to expand the act's coverage. 39 Fed. Reg. 35385 (1974) ("[I]t was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees."). In addition, it seems unlikely that Congress, while aiming to protect more domestic service employees, would have simultaneously excluded previously included domestic service employees without any reference to doing so in the Amendments' legislative history.

Because the FLSA already covered most third-party domestic service employees, it stands to reason that when Congress sought to expand coverage of the act, it had in mind the many workers employed on an individual and personal basis, by household members and/or family members. Various House and Senate Reports support this conclusion. The Reports describe domestic service by observing that "[t]he generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home of the person *by whom he or she is employed.*" *See* S. Rep. No. 93-690, 93rd Cong., 2d Sess. 20 (1974) (emphasis added); S. Rep. No. 93-300, 93rd Cong., 1st Sess. 22 (1973); H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. 35 (1974). Petitioners seek to undermine this description as one that was "generally accepted" by observing that domestic service was often equated with "private household workers." Pet. Br. at 35-36 (referencing Department of Labor, Report to Congress on Minimum Wage and Maximum Hours Under the Fair Labor Standards Act (1973), at 27; Department of

Labor, Report to Congress on Minimum Wage and Maximum Hours Under the Fair Labor Standards Act (1974), at 31-32). Because DOL Reports describe the latter phrase to include employers other than homeowners,[4] Petitioners reason that when members of Congress used "private household workers" they were necessarily indifferent to "the nature of the employer." Pet. Br. at 36. The legislative history does not support this argument nor does the history of domestic service.

The mere fact that DOL used the phrase "private household workers" to refer to "domestic service employees" (and defined "private household workers" so as to include third-party employers)[5] does not support Petitioners' view that the phrase included third-party employment. The former phrase appears to have come into vogue with the National Committee on Household Employment (NCHE), an organization started in 1928 to improve conditions in domestic service and to elevate the job into a profession. *See* BENJAMIN ANDREWS, ECONOMICS OF THE HOUSEHOLD 501-04 (1935); Peggie Smith, *Regulating Paid Household Work: Class, Gender, Race and Agendas of Reform*, 48 AMERICAN UNIV. L. REV. 851, 883-85 (1999).[6]

---

[4] *See* Department of Labor, Report to Congress on Minimum Wage and Maximum Hours Under the Fair Labor Standards Act (1973), at 27; Department of Labor, Report to Congress on Minimum Wage and Maximum Hours Under the Fair Labor Standards Act (1974), at 31-32.

[5] *Id.*

[6] While the shift from the phrase "domestic service" to phrases such as "household worker" and "household employee" gained popularity as a result of the NCHE, these and similar phrases were used much earlier and interchangeably with "domestic service" and "servant." *See, e.g., Household Employment and the Business Basis*, 2 BULL. INTER-MUNICIPAL COMM. ON HOUSEHOLD RES. 8, at 8-9 (Nov. 1905) (referencing

(Continued on following page)

An initial priority for NCHE was to replace the use of terms such as "servant," "maid," and "domestic" with the phrase "household employee." ANDREWS, at 502. Throughout the 1930s and 1940s, commentators used a variety of phrases interchangeably to refer to domestic service including "household employees," "household workers" and "houseworker." *See, e.g.*, Clara Cook, *Help Wanted!* at 1, 16 (Women's Trade Union League, 1939) (using "domestic worker" and "household employee" interchangeably); Benson Ellis, *Unemployment Insurance for the Household Worker*, 34 J. OF HOME ECON. 161, 161 (1942) (referring to domestic service employees as "household workers"); Mary Everett, *Can Domestic Service Be Standardized? Industrial Regulation Versus Human Values in Household Employment*, 30 J. AM. ASS'N U. WOMEN 90, 90-92 (1937) (using "domestic," "maids," "houseworkers," and "girl" interchangeably).[7]

---

comments by individuals who used various phrases to describe domestic service workers including "houseworker" and "household employee").

[7] Commentators often referred to "employment agencies" when speaking of domestic service in private homes but by all accounts such agencies were not employers of the domestics. Instead, the agencies were placement agencies that matched workers with household employers. *See* Marie Correll, *Standards of Placement Agencies for Household Employees*, BULLETIN OF THE WOMEN'S BUREAU, No. 112, at 1 (1934) ("Agencies placing domestic workers have an opportunity to influence employment contracts by the giving of information and by refusing to recommend an unreliable worker or a position where the terms and conditions of employment are considered unsatisfactory."); *id.* at 1 (observing that household employment agencies "secur[e] positions for applicants"); BRENDA CLEGG GRAY, BLACK FEMALE DOMESTICS DURING THE DEPRESSION IN NEW YORK CITY, 1930-40, at 5 (1993) (discussing "[e]mployment agencies" during the Depression "whose primary purpose was to help domestics find work during the thirties").

Moreover, commentators used these phrases in discussions that not only had no relevance to third-party employment but which underscored domestic service employment as a "household employment . . . relation between individual employer and employee. . . ." Eleanor B. Johnson, *Household Employment in Chicago,* BULLETIN OF THE WOMEN'S BUREAU, No. 106, at 2 (1933). *See also* Jean Collier Brown, *Reading List of References on Household Employment,* BULLETIN OF THE WOMEN'S BUREAU, No. 154, at vii (1937) ("Household employment is a relation between individual employers and individual employees."); Correll, *Standards of Placement Agencies for Household Employees,* at 1 (describing household employment as "a personal relationship between employer and employee, an individual bargain for employment"); Amey Watson, *Household Employment in Philadelphia,* BULLETIN OF THE WOMEN'S BUREAU, No. 93, at 46 (1932) (discussing section on "Employers' Labor Policies" in regard to "householders who employ domestic workers").[8]

---

[8] Historians of domestic service also consistently underscore the personal and individual character of the employment relationship. *See, e.g.*, ELIZABETH CLARK-LEWIS, LIVING IN, LIVING OUT, at 100-13 (1994) (describing the personal quality of the domestic service relationship in connection with African-American household workers who migrated from the South to work in Washington, D.C. during the 1910s and 1920s); EVELYN NAKANO GLENN, ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE, at 153-64 (1986) (describing "Employer-Employee Relations" in domestic service, in the context of Japanese American domestics, as a personal relationship characterized by inequality); DAVID M. KATZMAN, SEVEN DAYS A WEEK: WOMEN AND DOMESTIC SERVICE IN INDUSTRIALIZING AMERICA, at 146-83 (1978) (describing the employing class in terms of the mistress/servant relationship in the period from 1870 to 1920); PHYLLIS M. PALMER, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945, at 71-87 (1989) (describing the hiring and supervision of domestic service employees by

(Continued on following page)

In short, the fact that House and Senate Committee Reports borrowed from various DOL Reports and occasionally used the phrase "private household workers" to refer to domestic service employees should not be taken as evidence that members of Congress were "not thinking about the nature of the employer," Pet. Br. at 36, or that they were using the phrase so as to include third-party employment. Indeed, to the contrary, House and Senate Reports on the 1974 Amendments indicate that Congress was centrally concerned about domestic service employers who were individual households and/or family members, and more specifically housewives. S. Rep. No. 93-690, at 20 ("This Committee is convinced that legislation ... with respect to fair labor standards for domestics will be followed by voluntary compliance on the part of most housewives."); H.R. Rep. No. 93-913, at 33 ("[Domestic service employees] have no appeal against the employer who calls suddenly in the morning, or announces upon arrival, 'We won't need you, after all.'"); H.R. Rep. No. 93-232, 1st Sess., at 95 (1973) (minority views) ("Each of these newly affected [household] employers ... would have to keep records of hours worked on a regular basis, overtime, and salaries paid. Do we really want to subject housewives to possible criminal penalties for failure to keep these records accurately?"); 119 Cong. Rec. 24,797 (1973) (statement of Sen. Dominick) ("Do we want to try to pass a law which is

---

housewives during the 1930s and 1940s); JUDITH ROLLINS, BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS, at 156 (1985) (describing domestic service as "a personal relationship between employer and employee"); BONNIE THORNTON-DILL, ACROSS THE BOUNDARIES OF RACE AND CLASS: AN EXPLORATION OF WORK AND FAMILY AMONG BLACK FEMALE DOMESTIC SERVANTS, at 8-9 (1994) (describing the domestic service relationship as an individual employment relationship).

not going to be abided by by the householder, either in terms of amount or in terms of reporting?"); *id.* ("It is unrealistic to expect accurate recordkeeping. Nobody is going to keep any records. . . . No housewife is going to begin to do this kind of recordkeeping."); *id.* (statement of Sen. Javits) (referencing the number of housewives complying with the Social Security Act with respect to domestic service employees); *id.* at 24,798 (statement of Sen. Dominick) ("Why in the world should the Government keep putting on the *private individual* the onus of keeping records after records and making reports after reports . . . ?") (emphasis added); *id.* at 24,799 (Statement of Mr. Williams) (noting the lack of respect accorded to domestic service employees and stating "[t]hey are called 'girl' and by their first names while they, themselves, must still address their employers and their employer's children as 'ma'am' or 'sir' or 'Miss Jane' "); *id.* ("In lieu of fair wages, [domestic service employees] are often given secondhand clothing and leftover food."); S. Rep. No. 93-300, 93rd Cong., 1st Sess. 121 (1973) (minority views) ("Because some domestic workers are poorly paid, is no reason to bring the Federal bureaucracy into the kitchen of the American housewife.").

Petitioners argue that excluding third-party employers from section 213(a)(15) would undermine Congressional intent " 'to include within the coverage of the Act all employees whose vocation is domestic service.' " Pet. Br. at 14 (*quoting* S. Rep. No. 93-690, at 20). Yet Petitioner fails to appreciate that "domestic service employment" is limited to the companionship services exemption. While Petitioners are arguably correct that Congress did not intend to create a distinction between domestic service employment by households to provide companionship

services and companionship employment by "a family member to help out another family member in the latter's home," *id.* at 37, Petitioners are incorrect that interpreting "domestic service employment" to exclude third-party employers will lead to this result. This Court should not hold that domestic service, as used in section 213(a)(15), applies "only to homeowner-employed domestic workers. . . ." *Id.* Instead, it should hold that such employment *does not* apply to third-party employers; namely agency employers that employ domestic service employees and staff them in private homes.

This approach most clearly reflects the reality and understanding of domestic service employment that shaped Congressional intent. As previously noted, the FLSA already provided a basis for coverage of third-party employers if they satisfied the enterprise test. In addition, even as one recognizes that the majority of all domestic service employment was between an employee and the employing household, there is no reason to think that by "domestic service employment" Congress did not intend to include other personal domestic service employment relationships such as those where an employing family member does not reside in the household where the services are being performed.[9]

[9] In the instance of the severely disabled householder who needs companionship services, cited by Petitioners and their *amici*, Pet. Br. at 38; Br. of National Association For Home Care & Hospice, Inc. at 6, the requirement of domestic service employment in the companionship exemption can be satisfied by simply having a family member employ the companion as the legal guardian of the householder.

B. Congress Intended to Exclude Only Non-"Bread-Winners" Who Work as Domestic Service Companions

In crafting the companionship services exemption, Congress appears to have taken comfort in the belief that it would have few, if any, adverse economic consequences for individuals performing such services. House and Senate Reports observed that "[p]eople who will be employed in the excluded categories are not regular bread-winners or responsible for their families' support." S. Rep. No. 93-690, at 20; H.R. Conf. Rep. No. 93-413, at 27; H.R. Rep. No. 93-913, at 36. In today's world, the group of home care workers employed by third-party agencies who are frequently classified under the FLSA as companions jarringly defies this observation. The average home-care worker is a low-income woman and a single mother of children under the age of eighteen. *See, e.g.*, STEVE DAWSON & RICK SURPIN, DIRECT CARE HEALTH WORKERS: THE UNNECESSARY CRISIS 12 (2001), *available at* http://www.directcareclearinghouse.org/download/Aspen.pdf (commenting that the "typical direct-care worker is a low-income woman, between the ages of 25 and 54, who is a single mother"); ROBYN STONE, LONG-TERM CARE WORKFORCE SHORTAGES: IMPACT ON FAMILIES 2 (2001), *available at* http://www.bjbc.org/content/docs/LTC_Workforce_Shortages.pdf ("Compared to the workforce in general, nursing home and home health care aides are more likely to be non-white, unmarried and with children under age 18 at home."); *Nursing Workforce Recruitment and Retention of Nurses and Nurse Aides Is a Growing Concern: Hearing Before the S. Comm. on Health, Education, Labor & Pensions* 107th Cong. 22 (2001) (statement of William J. Scanlon, Director, Health Care Issues), *available at* http://www.gao.gov/new.items/d01750t.pdf ("Aides working in nursing homes and

home care are much more likely than other workers to be uninsured, living below the poverty level, and receiving public benefits such as food stamps and Medicaid."). In 2003, the wages of home-care aides, when annualized for full-time employment, were less than $17,000. BERNADETTE WRIGHT, DIRECT CARE WORKERS IN LONG-TERM CARE 2 (2005), *available at* http://www.hcbs.org/files/75/3748/directcare.pdf (reporting annualized full-time employment earnings of $16,750 for personal and home-care aides, and $18,200 for home-health aides). Interpreting the companionship exemption to exclude third-party employers of these workers who are often familial breadwinners accurately reflects Congressional intent.

II. OTHER FEDERAL EMPLOYMENT STATUTES SUPPORT THE EXCLUSION OF DOMESTIC SERVICE COMPANIONS EMPLOYED BY THIRD PARTIES

Interpreting "domestic service employment" in the FLSA's companionship exemption to exclude third-party employers also finds support in other federal employment law statutes. Those statutes, including the Social Security Act, the National Labor Relations Act, and the Occupational Safety and Health Act, have uniformly limited the exclusion of domestics, whether express or implied, to those workers employed on a personal basis. Before the Social Security Act was amended in 1950 to extend coverage to domestics, it excluded "Domestic Service in a private home." Social Security Act of 1935, § 210(b)(2). The regulation defining domestic service under the original Act made clear that the exclusion did not extend to employees of third-party employers. The regulation defined "Domestic Service" as "Services of a household nature performed

by an employee in or about the private home of the person by whom he is employed." 20 C.F.R. § 403.809 (1949). Likewise, the current version of the Social Security Act permits special treatment only to wages paid to "an employee for domestic service in a private home of the employer. . . ." 42 U.S.C. § 409(a)(6)(B) (2000).

Section 2(3) of the National Labor Relations Act (NLRA) excludes from the definition of "employee" anyone employed "in the domestic service of any family or person at his home." 29 U.S.C. § 152(3). The National Labor Relations Board has defined the domestic service exclusion so as to limit it to "'employment on an individual and personal basis.'" *30 Sutton Place Corp. & Local 32B-32J, Service Employees Int'l Union*, 240 NLRB 752, 753 n.6 (1979) (*quoting Success Village Apartments, Inc. v. Local 376, UAW*, 397 A.2d 85, 87 (Conn. 1978)). *See also Ankh Serv., Inc.*, 243 NLRB 478, 480 (1979) (observing that the exemption has been applied based "on the principals to whom the employer-employee relationship . . . runs and not merely on the undisputably 'domestic' nature of some of the services rendered"); *Personal Touch Home Care, Inc.*, Case No. 29-RC-9697 (2001), *available at* http://www.nlrb.gov/nlrb/shared_files/decisions/dde/2001/2-RC-22447.pdf (rejecting the claim that the NLRA exempts third-party home care employees as "domestic service" employees under the Act).

The Occupational Safety and Health Act does not exempt domestic service from coverage. However, DOL regulations interpreting the Act do explicitly exempt domestic service employment as a matter of policy. 29 C.F.R. § 1975.6. The relevant regulation states that "individuals who, in their own residences, privately employ persons for the purpose of performing . . . what are

commonly regarded as ordinary domestic household tasks, such as house cleaning, cooking, and caring for children, shall not be subject to the requirements of the Act with respect to such employment." *Id.* Because DOL defines employers of "domestic service" as those "individuals who, in their own residences, privately employ persons," the exemption does not extend to third-party domestic service employers. *Id. See also* Peggie Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the 21st Century*, 92 IOWA L. REV. – (forthcoming 2007) (discussing OSHA's relevance to domestic service employees).

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

JAMES REIF
GLADSTEIN, REIF
& MEGINNISS, LLP
817 Broadway, Floor 6
New York, New York 10003-4709
(212) 228-7727